2

No. 96-1593

Supreme Court, U.S.
FILED
MAY 8 1997
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

JAMES A. HINCHLIFFE,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

KYLE A. BURCH
Solicitor, Borough of Trainer
Counsel of Record
Attorney for Respondent
22 State Road
Media, Pennsylvania 19063
(610) 891-0788

71142 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

14

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Commonwealth of Pennsylvania [Borough of Trainer] prove that the vegetation growing on Mr. Hinchliffe's property consisted of weeds, grasses, and similar vegetation which were not planted for some useful or ornamental purpose, which were exceeding six inches in height, and which were within two hundred feet of any residentially zoned property?

2. Is the Commonwealth of Pennsylvania [Borough of Trainer] constitutionally entitled to restrict the growth of weeds, grasses, and similar vegetation on properties? (While Mr. Hinchliffe has raised the constitutionality of the ordinance as an issue in his brief, he did not present any evidence, testimony, or argument regarding constitutionality at the time of trial.)

TABLE OF CONTENTS

	Page
Counter-Statement of Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Counter-Statement of the Case	1
Reasons for Denying the Writ	4
I. This Honorable Court Has No Jurisdiction. ...	4
II. The Trial Court Did Not Err In Finding Mr. Hinchliffe Guilty Beyond A Reasonable Doubt Of Violating The Trainer Borough Code Relating To Uncut Grass Or Weeds, Given That The Borough Presented Uncontroverted Testimony And Other Evidence Which Proved Beyond A Reasonable Doubt That Mr. Hinchliffe Had Violated The Code. The Borough Successfully Proved Beyond A Reasonable Doubt Each Element Of Each Offense, And The Trial Court Correctly Concluded That The Borough Had Met Its Burden Of Proof.	5
III. The Ordinance Is Constitutional.	9
Conclusion	11

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Garcia v. Gray, 507 F.2d 539 (1974), *cert. denied,* 95 S. Ct. 1967, 421 U.S. 971, 44 L. Ed. 462 10

Groff v. Commonwealth of Pennsylvania, 100 Pa. Cmwlth. 135, 514 A.2d 300 (1986) 9

Lawton v. Steele, 152 U.S. 133, 14 S. Ct. 799, 38 L. Ed. 385 (1894) 9, 10

Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972, 497 U.S. 502, 111 L. Ed. 2d 405 (1990) .. 9

Sobocinski v. Williamsport, 13 Pa. Cmwlth. 425, 319 A.2d 697 (1974) 8, 9

Rule Cited:

Supreme Court Rule 10 4

Other Authority Cited:

Webster's Third New International Dictionary of the English Language (1986) 8

COUNTER-STATEMENT OF THE CASE

The petitioner, James A. Hinchliffe, is the owner of a vacant lot located within the Borough of Trainer, Delaware County, Pennsylvania. The lot consists of approximately two acres and is residentially zoned.

The Borough of Trainer has an ordinance, codified at Section 10, Sub-sections 101 *et seq.* of the Code of Ordinances of the Borough of Trainer, which provides that any property within a residentially zoned district or within two-hundred feet of a residentially zoned district must be maintained to the extent that no grasses, weeds, or similar vegetation may exceed six inches. On or about June 20, 1994 the Borough of Trainer sent a notice to Mr. Hinchliffe that he was in violation of the ordinance.

As a result of receiving the aforesaid notice, Mr. Hinchliffe came to the Borough of Trainer and asked for a copy of the ordinance. After obtaining a copy of the codified ordinance, Mr. Hinchliffe came back to the Borough of Trainer and asked for a copy of the ordinance prior to it being codified. Such a copy was also provided to him.

Despite the receipt of the notice of violation and the two copies of the ordinance, Mr. Hinchliffe did not take any action to cut the weeds, grasses, and similar vegetation on his property. The June 20, 1994 notice specifically indicated that he had fourteen days in which to correct the violations. Mr. Hinchliffe did not take any action and, on July 28, 1994, two citations were issued to Mr. Hinchliffe for the ordinance violations.

Testimony presented at the July 5, 1995 trial was that Mr. Hinchliffe, despite the citations, still had, as of the date of the trial, not cut the weeds, grasses, and similar vegetation on his property, other than the portions of his property which were

within twenty feet of a neighbor's boundary line. (It should be noted that a prior ordinance required that such vegetation only be cut within twenty feet of a boundary line. The new ordinance, of which Mr. Hinchliffe received notice by the June 20, 1994 letter from the Borough (as well as required public advertising), amended the old ordinance by providing that all lots within residentially zoned districts be maintained so that the grasses and weeds do not exceed six inches and all lots within two-hundred feet of a residentially zoned district be so maintained.)

Testimony presented at the July 5, 1995 trial was that the grasses, weeds, and similar vegetation were at least two feet in height. The Borough Board of Health had received complaints of rats running through the high grasses and weeds on the property, as well as complaints about insects coming from the property.

The subject property, while vacant, abuts neighboring residences. The Board of Health deemed the property to constitute a health hazard. The witnesses presented at the time of the hearing indicated that they did not view any ornamental flowers on the property. The testimony was, that if there were any ornamental flowers located on the property, they were covered by high grasses and weeds. Further, the vegetation seen on the property in July of 1994 was tall, reedlike, straight weeds and high grass.

Testimony of a borough councilman also indicated that the ordinance was adopted to promote the health, safety, and welfare of the community.

Mr. Hinchliffe also specifically chose not to proceed with any constitutionality claim at the time of the July 28, 1995 trial.

The petitioner did not present any testimony or evidence

contradicting the fact that there were weeds and grasses on the subject parcel of property which were in excess of six inches in height and that his property was residentially zoned and within two-hundred feet of other residentially zoned properties. He merely questioned the ability of the Borough officials to distinguish between weeds and flowers.

The trial court found that the Borough officials had proven that weeds and grasses existed on the property which were in violation of the ordinance. Therefore, Mr. Hinchliffe was found guilty of the citations.

Mr. Hinchliffe, in his statement of the case, indicates that ornamental wild flowers, such as the wild sweet pea, wild lily, wild sunflower, black eyed susan, miniature corn flower, common daisy, and dwarf daisy must grow in excess of six inches to blossom and to reseed. However, there was never any evidence that any such flowers existed on the subject property. Even if there was evidence of the existence of such flowers, there was no evidence to contradict the Borough officials' testimony that grass and weeds in excess of six inches existed on the subject property.

REASONS FOR DENYING THE WRIT

I.

THIS HONORABLE COURT HAS NO JURISDICTION.

Rule 10 of the Rules of the Supreme Court of the United States provides the jurisdiction of this Honorable Court on a Writ of Certiorari. Rule 10 indicates that review on a Writ of Certiorari is not a matter of right, but of judicial discretion. A Petition for a Writ of Certiorari will only be granted for compelling reasons. Certiorari should not be granted in this matter because there has not been any federal question presented by the case. The case merely consists of a court having found that the owner of a lot of land in a residentially zoned district had grass and weeds growing on his property in excess of six inches in height, in contradiction of a municipal ordinance. Mr. Hinchliffe, the landowner, is complaining about the factual findings of the trial court. The court found that weeds and grasses existed on the property in violation of the ordinance. Mr. Hinchliffe apparently takes the position that the weeds and grasses found to be in existence by the court were actually ornamental wild flowers which he argues would be permitted by the ordinance. The ordinance does permit ornamental plantings in excess of six inches. The trial court found that there may have been ornamental plants on the lot, but the existence of some ornamental plants did not alter the fact that weeds and grasses also existed which were in excess of six inches.

II.

THE TRIAL COURT DID NOT ERR IN FINDING MR. HINCHLIFFE GUILTY BEYOND A REASONABLE DOUBT OF VIOLATING THE TRAINER BOROUGH CODE RELATING TO UNCUT GRASS OR WEEDS, GIVEN THAT THE BOROUGH PRESENTED UNCONTROVERTED TESTIMONY AND OTHER EVIDENCE WHICH PROVED BEYOND A REASONABLE DOUBT THAT MR. HINCHLIFFE HAD VIOLATED THE CODE.

THE BOROUGH SUCCESSFULLY PROVED BEYOND A REASONABLE DOUBT EACH ELEMENT OF EACH OFFENSE, AND THE TRIAL COURT CORRECTLY CONCLUDED THAT THE BOROUGH HAD MET ITS BURDEN OF PROOF.

There are two ordinances of which the trial court found Mr. Hinchliffe guilty. The first, Trainer Borough Ordinance Section 10-101, provides that

> It shall be unlawful for any owner, occupant, tenant, property manager or other property agent of property located within the Borough of Trainer to permit grass, weeds and/or similar vegetation not planted for some useful or ornamental purpose to grow or remain on said premises at a height exceeding six (6) inches in any area which is residentially zoned and, further, in any area which is within two-hundred (200) feet of any residentially zoned property. Any such grass, weeds and similar vegetation in excess of six (6) inches and within a residentially zoned

> district is hereby declared to be a nuisance and detrimental to the health, safety, and comfort of the inhabitants of the Borough.

The other Borough ordinance at issue, being ordinance 10-102, reads as follows:

> All grass, weeds and/or other vegetation permitted to grow or remain contrary to the provisions of § 101 of this part shall be abated by the said owner, occupant, tenant, property manager or other property agent of said properties . . . .

The Borough provided uncontroverted testimony that conclusively demonstrates that Mr. Hinchliffe allowed weeds, grass, and other unspecified vegetation to grow to a level of two to two and one-half feet, clearly in excess of the six inch statutory limit. Mr. Hinchcliffe does not dispute that he is the owner of the property in question, or that the property is residentially zoned and within 200 feet of other residentially zoned properties. Consequently, the Borough proved that Mr. Hinchliffe was the owner of real estate within the Borough of Trainer, and that Mr. Hinchliffe permitted weeds, grass and other vegetation on his property to grow to a height of two to two and one-half feet, clearly in excess of the six inch limit.

Mr. Hinchliffe permitted this excessive growth despite being notified of the fact that this growth of vegetation was in violation of the borough code and despite the fact that he was given approximately 34 days notice prior to the issuance of citations. Clearly Mr. Hinchliffe was given ample time to correct the violations, yet he failed to act in any way. In addition to uncontroverted evidence in support of the fact that Mr. Hinchliffe was properly notified, Mr. Hinchliffe has failed to allege any

defect in notice, both at trial below and on this appeal. Thus notice is not an issue here.

Mr. Hinchliffe attempted to challenge the Borough's witnesses as to whether the vegetation growing on his property was "weeds or grass" as required by the statute, as opposed to ornamental flowers. However, Mr. Hinchliffe did not produce any contradictory testimony.

The vegetation was described as "weeds" and high grasses by the only witnesses. Certainly, weeds and grass can be accurately identified by anyone with general knowledge.

This uncontroverted testimony is proof beyond a reasonable doubt of the elements of the offense, and the trial court is uniquely situated to determine credibility of witnesses and what weight their testimony is given. The trial court's evaluation of the demeanor of witnesses and their credibility must not be disturbed absent evidence that the trial court abused its discretion. The trial court's decision was not an abuse of discretion.

Contrary to Mr. Hinchliffe's attempted challenges at the time of trial, the distinction between "grass" and "weeds" is nonexistent. Mr. Hinchliffe has requested the Pennsylvania state courts to interpret the terms *grass* and *weeds* in such a hypertechnical fashion that conviction under the Trainer Borough Ordinance would be impossible without the testimony of an agricultural expert or botanist.

The words *grass* and *weeds* are not intended to be technical or specific terms, and thus must be given their common meaning. Generally, *grass* is defined as:

> a green herbage that affords food for grazing

> animals and that usually consists of predominately narrow leaved monocotyledonous plants . . ., often intermixed with various dicotyledonous herbs.

Webster's Third New International Dictionary of the English Language, 19761 (1986). Clearly this is a very broad term, and the definition includes clover, a dicotyledonous herb that affords food for grazing animals, but that is also considered a "weed" when it appears on a suburban lawn. Similarly, *weeds* are defined as:

> a plant of unsightly appearance, one of wild rank or growth; A form of vegetable life or exuberant growth and injurious effect; Wild growth usually in the nature of rank grass or undergrowth.

Webster's Dictionary.

The common meanings of these words demonstrate that the trial court was presented with uncontroverted evidence that grass and weeds were growing on Mr. Hinchliffe's property at height levels far in excess of the six inch limit. Mr. Hinchliffe presented no evidence to challenge the fact that grasses and weeds were growing wild on his property.

It has been specifically held in Pennsylvania that grass and weed ordinances are a valid exercise of a municipality's police power and that a challenge to a municipal official's determination that vegetation consisted of "weeds" was dismissed. *See Sobocinski v. Williamsport,* 13 Pa. Cmwlth. 425, 319 A.2d 697 (1974).

In conclusion, the Borough of Trainer met its burden of

proving beyond any doubt that Mr. Hinchliffe allowed weeds, grass, and similar vegetation to grow wild on his property so that these plants reached a height of over two feet. This is clearly a violation of the Trainer ordinance regarding the cutting of grass, and Mr. Hinchliffe has failed to present any evidence to the contrary. As a result, the Borough of Trainer respectfully requests that Mr. Hinchliffe's Petition for Writ of Certiorari be denied.

III.

THE ORDINANCE IS CONSTITUTIONAL.

The testimony at the time of the hearing was that the ordinance was adopted to promote the health and safety of the citizens of the Borough of Trainer. Mr. Hinchliffe did not present any testimony to the contrary. In Pennsylvania, the burden lies with the person challenging the constitutionality of an ordinance to prove that it is unconstitutional. *See Groff v. Commonwealth of Pennsylvania,* 100 Pa. Cmwlth. 135, 514 A.2d 300 (1986). Pennsylvania's presumption of validity of municipal ordinances is similar to the Honorable Court's presumption of validity of state statutes. *See Ohio v. Akron Center for Reproductive Health,* 110 S. Ct. 2972, 497 U.S. 502, 111 L. Ed. 2d 405 (1990). Weed and grass ordinances which declare that vegetation above a certain height is a nuisance and require the abatement of the nuisance are a valid exercise of the municipality's police power. *Sobocinski v. Williamsport,* 13 Pa. Cmwlth. 425, 319 A.2d 697 (1974). The Pennsylvania Commonwealth Court in *Sobocinski* relied upon the decision of the United States Supreme Court in *Lawton v. Steele,* 152 U.S. 133, 14 S. Ct. 799, 38 L. Ed. 385 (1894) in which it was stated that:

> To justify the State in thus interposing its authority in behalf of the public, it must

> appear, first, that the interests of the public generally, as those from a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.

152 U.S. at 137, 14 S. Ct. at 501.

In the case at bar, the testimony presented was that the purpose of the ordinance was to promote the health, safety, and welfare of the residents of the community. Further, the restriction on the height of weeds and grasses in the residential zoning district is reasonably necessary to limit the areas in which insects, rats, and other vermin might live. Finally, Mr. Hinchliffe has never stated that cutting his small lot would be unduly oppressive.

The ordinance at question specifically declares weeds and grasses which are in excess of six inches to be a public nuisance. It has been held that the regulation and abatement of nuisances is one of the basic functions of police power generally considered to have been given to a municipality. *See Garcia v. Gray,* 507 F.2d 539 (1974), *cert. denied,* 95 S. Ct. 1967, 421 U.S. 971, 44 L. Ed. 462.

Further, Mr. Hinchliffe withdrew his constitutionality arguments at the time of trial.

CONCLUSION

The Commonwealth of Pennsylvania, Borough of Trainer, proved beyond any doubt each of the elements of the offenses that Mr. Hinchliffe was found to be in violation of by the trial court. The Commonwealth of Pennsylvania, Borough of Trainer, has met its burden, and there was no evidence presented by Mr. Hinchliffe in the record to contradict or rebut Trainer's evidence. At best, Mr. Hinchliffe is alleging a factual error on the part of the trial court. It is his position that the lot consisted of ornamental flowers which are permitted under the subject ordinances. This case is not about whether a flower can exist on a property in excess of six inches. It is about whether Mr. Hinchliffe had weeds and grasses on his property in excess of six inches.

There has not been any federal question raised which requires the attention of the Supreme Court of the United States. The subject ordinance is constitutional.

Respectfully submitted,

KYLE A. BURCH
Solicitor, Borough of Trainer
Counsel of Record
Attorney for Respondent
22 State Road
Media, Pennsylvania 19063
(610) 891-0788